(1)

01 561 SEP 27 2001

NO.: _____

In The
Supreme Court of the United States

MARVIN K. SPEIGNER, JR.,

Petitioner,

vs.

WILLIE A. ALEXANDER, CLYDE C. HENNIES, and THE ALABAMA STATE MILITARY DEPARTMENT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

COUNSEL FOR PETITIONER:
J. DOYLE FULLER,
Law Office of J. Doyle Fuller,L.L.C.
2851 Zelda Road
Montgomery, Alabama 36106
(334) 270-0020

58 pp

QUESTION PRESENTED FOR REVIEW

In 1998, Petitioner Marvin K. Speigner, Jr. was a Lieutenant Colonel in the Alabama Army National Guard. That year, the Selective Retention Board ("SRB") of the Alabama Army National Guard recommended that the Petitioner not be retained and the Petitioner left the Army National Guard in April of 1998. Between the years of 1996 through 1999, the SRB did not retain 41 white male officers of the Alabama Army National Guard while black officers had a 100% retention rate.

On July 9, 1999, the Petitioner filed a complaint against the Respondents in the Circuit Court of Montgomery County, Alabama, alleging racial discrimination under 42 U.S.C. §1981, denial of equal protection under 42 U.S.C. §1983, denial of due process under 42 U.S.C. §1983 and a race-based conspiracy under 42 U.S.C. 1985(3). The Complaint sought damages and declarative and injunctive relief but the Petitioner eventually voluntarily dismissed all claims for damages. The Respondents filed a Notice of Removal to the Federal District Court for the Middle District of Alabama.

On April 10, 2000, the Respondents filed a Motion for Summary Judgment on the basis that the claims raised by the Petitioner for injunctive and declaratory relief were nonjusticiable and the District Court granted summary judgment on this basis. A timely appeal was taken to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit affirmed the decision of the District Court, holding that all "cases brought by military personnel against the military for injuries incident to service are nonjusticiable, whether the claims re-

quest monetary damages or injunctive relief."

The question presented in this case, as to which the courts of appeals are in conflict and which the Eleventh Circuit Court of Appeals decision is in conflict with this Court, is as follows:

Whether military personnel are barred by the doctrine of nonjusticiablity from redress designed to halt or prevent unconstitutional discrimination under 42 U.S.C. §1981, §1983 and §1985(3) against the Alabama Army National Guard and its Adjutant General.

RULES 29.6 AND 14.1 STATEMENT

Petitioner is an individual adult resident of the State of Alabama. Until April of 1998, the Petitioner was a Lieutenant Colonel in the Alabama Army National Guard.

Respondents are the Alabama State Military Department; Clyde C. Hennies, Major General, former Adjutant General, Alabama Army National Guard; Willie A. Alexander, Major General, former Adjutant General of the Alabama Army National Guard.

PARTIES TO THE PROCEEDINGS

Petitioner:
Marvin K. Speigner

Counsel for the Petitioner
J. Doyle Fuller
Law Office of J. Doyle Fuller, L.L.C.
2851 Zelda Road
Montgomery, Alabama 36106
(334) 270-0020

Respondents:
Willie A. Alexander
Clyde C. Hennies
Alabama State Military Department

Counsel for Respondents
The Honorable Bill Pryor
Attorney General of Alabama
J. Park, Jr.
Margaret L. Fleming
Assistant Attorneys General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130

Courtney W. Tarver
Bureau of Legal Services
P.O. Box 301410
Montgomery, Alabama 36130-0410

TABLE OF CONTENTS

PAGE(S)

QUESTION PRESENTED i
RULES 29.6 AND 14.1 STATEMENT ii
TABLE OF AUTHORITIES vii
OPINIONS BELOW 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
STATEMENT 3
A. ACTUAL AND PROCEDURAL BACKGROUND 3
B. THE DISTRICT COURT'S RULING 5
C. THE ELEVENTH CIRCUIT'S DECISION 6

REASONS FOR GRANTING THE PETITION 7
I. THIS COURT'S DECISION IN *CHAPPELL* AND *STANLEY* 7
II. THE CIRCUITS ARE SPLIT OVER WHETHER MILITARY PERSONNEL ARE BARRED FROM BRINGING ACTIONS FOR INJUNCTIVE AND DECLARATORY RELIEF DESIGNED TO PREVENT OR HALT CONSTITUTIONAL VIOLATIONS 9
III. THE ELEVENTH CIRCUIT'S LIMITING OF THIS COURT'S STATEMENT IN *CHAPPELL* AND *STANLEY* CONFLICTS WITH THIS COURT'S CLEAR HOLDING 14

CONCLUSION 20

INDEX TO APPENDICES

A. Memorandum Opinion of the United States District Court for the Middle District of Alabama, Northern Decision ..... App. 1-15

B. Opinion of the United States Court of Appeals for the Eleventh Circuit affirming the judgment of the District Court ..... App. 16-28

C. Order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's Petition for Rehearing En Banc ..... App. 29-30

D. 42 U.S.C. § 1981 ..... Page 1

E. 42 U.S.C. § 1983 ..... Page 2

F. 42 U.S.C. § 1985(3) ..... Page 2

TABLE OF AUTHORITIES

PAGE(S)

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) 18

Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362 (1983) 6, 7, 8, 10, 13, 14, 15, 16, 17, 18, 20

Crawford v. Board of Education of City of Los Angeles, 458 U.S. 527, 102 S.Ct. 3211 (1982) 17

Crawford v. Texas Army Nat'l Guard, 794 F.2d 1034, 1036 (5th Cir. 1986) 9, 12, 16

Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed.2d 152 (1950) 12

Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764 (1974) 16

Jones v. New York State Div. of Military and Naval Affairs, 166 F.3d 45, 52 (2nd Cir. 1999) 9, 12

Jorden v. Nat'l Guard Bureau, 799 F.2d 99 (3rd Cir. 1986) 9, 14

Knutson v. Wisconsin Air Nat'l Guard, 995 F.2d 765 (7th Cir. 1993) 9, 10, 12, 17

Meister v. Texas Adjutant Gen. Dep't., 233 F.3d 332 (5th Cir. 2000) 9, 12

Mindes v. Seamon, 453 F.2d 197 (5th Cir. 1971) 12

M.L.B. v. S.L.J., 519 U.S. 102, 105, 117 S.Ct. 555, 558 (1996) 17

Personnel Administrator of Massachusetts, 442 U.S. 256, 99 S.Ct. 2282 (1979) 17

Speigner v. Alexander, 248 F.3d 1292, 1298 (11th Cir. 2001) 6, 9, 10, 16

United States v. Stanley, 483 U.S. 669, 107 S.Ct. 2362 (1987) 6, 7, 8, 10, 12, 13, 14, 15, 16, 18, 20

Watson v. Arkansas Nat'l Guard, 886 F.2d 1004 (8th Cir. 1989) 9

Wigginton v. Centracchio, 205 F.3d 504 (1st Cir. 2000) 9, 13

Constitutional and Statutory Provisions:

42 U.S.C. §1981 ..... 1, 5

42 U.S.C. §1983 ..... 2, 5, 13

42 U.S.C. §1985(3) 2, 5

PETITION FOR A WRIT OF CERTIORARI

Petitioner Marvin K. Speigner, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 16b-28b) is reported at 248 F.3d 1292. The opinion of the district court (App., *infra*, 1a-15a) is not a published decision.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on April 24, 2001. A timely application for rehearing was filed by the Petitioner. Said Application for Rehearing was denied by the Eleventh Circuit Court of Appeals on June 29, 2001. (App. *infra*, 29c-30c). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

§1981. Equal rights under the law.

"All persons within the jurisdiction of the United States

shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

§1983. Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

§1985. Conspiracy to interfere with civil rights.

"...(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all per-

sons within such State or Territory the equal protection of the laws' or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving him support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

STATEMENT OF THE CASE

The issue in this case is whether, military personnel are barred by the doctrine of nonjusticiablity from redress designed to halt or prevent unconstitutional discrimination under 42 U.S.C. §1981, §1983 and §1985(3) against the Alabama Army National Guard and its Adjutant General.

A. FACTUAL AND PROCEDURAL BACKGROUND

In 1998, Marvin K. Speigner, Jr. was a Lieutenant Colonel

in the Alabama Army National Guard. Because the Petitioner had over 20 years of service, he had to undergo an annual review of his military record by the Selective Retention Board of the Alabama Army National Guard (hereinafter referred to as "SRB"). The SRB was responsible for making recommendations to the Adjutant General concerning the continued service of all commissioned Officers and Warrant Officers of the Alabama Army National Guard with over twenty (20) years of service. The SRB made the decision whether officers and warrant officers with over twenty years service were retained or non-retained within the Army National Guard. In 1997, the SRB recommended that the Petitioner be retained for one year and in 1998, the SRB recommended that the Petitioner not be retained. The Petitioner left the Alabama Army National Guard in April of 1998. Prior to the Petitioner's separation from the Alabama Guard, he had heard Respondent Clyde Hennies, then Adjutant General of the Alabama Guard, comment about the lack of black colonels on his staff and that he wanted to do something about this fact.

Between the years of 1996 through 1999, the SRB did not retain 41 white male officers of the Alabama Army National Guard while black male officers had a 100% retention rate. Only one female and one "other" male were not retained during this period. Although regulations require that SRB panels consist of three or nine members, Respondent Hennies received an exception to expand the panels to five members. Regulations also precluded a member of a SRB panel from sitting on panels in consecutive years. Respondent Willie Alexander, Adjutant General of the Alabama Guard at the time this action

was filed, received special permission to sit on the 1997 and 1998 SRB panels pursuant to a request by Respondent Hennies.

On July 9, 1999, the Petitioner filed a complaint against the Respondents in the Circuit Court of Montgomery County, Alabama. The complaint contained allegations of racial discrimination under 42 U.S.C. §1981, denial of equal protection under 42 U.S.C. §1983, denial of due process under 42 U.S.C. §1983 and a race-based conspiracy under 42 U.S.C. 1985(3). The Respondents filed a Notice of Removal to the Federal District Court for the Middle District of Alabama.

The Complaint initially sought damages and declarative and injunctive relief but the Petitioner eventually voluntarily dismissed all claims for damages. The District Court eventually dismissed all Petitioner's claims against Respondent Hennies and all claims against Alexander in his individual capacity.

On April 10, 2000, the Respondents filed a Motion for Summary Judgment with the District Court on behalf of Alexander in his official capacity and the Alabama Military Department on the basis that the claims for injunctive and declaratory relief were nonjusticiable. The District Court granted summary judgment on this basis.

B. THE DISTRICT COURT'S RULING

In the District Court's memorandum opinion in this case, the District Court found that the Petitioner's claims for injunctive and declaratory relief on the basis of intentional racial and gender discrimination were not justiciable. Although the Dis-

trict Court noted that "[i]t seems antithetical to our system of justice to say that a court cannot redress intentional racial discrimination in our armed forces," App., *infra*, 15a, it found that it was bound to follow the law of this Court. The law to which the District Court referred was this Court's opinions in *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362 (1983) and *United States v. Stanley*, 483 U.S. 669, 107 S.Ct. 2362 (1987). The Petitioner filed a timely notice of appeal.

C. THE ELEVENTH CIRCUIT'S DECISION

Affirming the District Court, the Eleventh Circuit specifically held that "cases brought by enlisted[1] personnel against the military for injuries incident to service are nonjusticiable, whether the claims request monetary or injunctive relief." *Speigner v. Alexander*, 248 F.3d 1292, 1298 (11th Cir. 2001).

The holding of the Eleventh Circuit, like the District Court's ruling, stems from that Court's interpretation of this Court's opinions in *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362 (1983) and *United States v. Stanley*, 483 U.S. 669, 107 S.Ct. 2362 (1987). The Eleventh Circuit, while recognizing that this Court's statement in *Chappell* and *Stanley* that injunctive relief is available

[1] It should be noted that the Petitioner was not an enlisted personnel. Instead, the Petitioner was a commissioned officer. While this appears to be a distinction without a difference because the same constitutional rights should be afforded to enlisted men and women as well as commissioned officers, the Petitioner wanted to note this technical error in the Eleventh Circuit's holding.

to military personnel to halt or prevent constitutional violations, chose to limit that relief to attacks on the facial validity of military regulations.

REASONS FOR GRANTING THE PETITITION

This Court should grant review for, at least, two reasons. First, the Eleventh Circuit's decision in this case relates to an important question that conflicts with this Court's previous decisions in *Chappell* and *Stanley*. Second, there is a conflict among the circuits as to the precise issue raised in this Petition, *i.e.*, whether military personnel are barred by the doctrine of nonjusticiability from redress designed to halt or prevent constitutional violations. The conflict between the Eleventh Circuit's decision and this Court's plain language in *Chappell* and *Stanley* and the conflict among the circuits needs to be settled by this Court.

I. THIS COURT'S DECISIONS IN *CHAPPELL* AND *STANLEY*

In *Chappell*, 462 U.S. at 305, 103 S.Ct. at 2368, this Court held that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." This Court noted that as

> Chief Justice Warren had occasion to note that 'our citizens in uniform may not be stripped of basic rights

> simply because they have doffed their civilian clothes.' E. Warren, The Bill of Rights and the Military, 37 N.Y.U.L.Rev. 181, 188 (1962). This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military sercive. See, *e.g.*, *Brown v. Glines*, 444 U.S. 348, 100 S.Ct. 609, 62 L.Ed.2d 540 (1980); *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973).

Chappell, 462 U.S. at 304, 103 S.Ct. at 2368 (emphasis added).

Then in *Stanley*, this Court reiterated its earlier holding in *Chappell* by stating that a member of the armed forces could not maintain an action for damages, against his superiors for injuries arising out of activity that was "incident to service." However, this Court clarified somewhat its statement in *Chappell* which is highlighted in the quote from *Chappell*. This Court stated that its statement that "we have 'never held, nor do we now hold, that military personnel are barred from all redress in civilian court for constitutional wrongs suffered in the course of military service'" "referred to redress designed to halt or prevent the constitutional violation rather than the award of money damages." *Stanley*, 483 U.S. at 683, 107 S.Ct. at 3063 (emphasis added).

This Court has specifically stated that military personnel are not barred from maintaining an action designed to halt or prevent, *i.e.*, declaratory or injunctive relief, constitutional violations. Thus, the Eleventh Circuit's decision limiting redress

of military relief for constitutional violations to just those actions attacking the facial validity of military regulations is in conflict with this Court's decisions in *Chappell* and *Stanley*.

II. THE CIRCUIT'S ARE SPLIT OVER WHETHER MILITARY PERSONNEL ARE BARRED FROM BRINGING ACTIONS FOR INJUNCTIVE AND DECLARATORY RELIEF DESIGNED TO PREVENT OR HALT CONSTITUTIONAL VIOLATIONS.

As the Eleventh Circuit noted in its opinion, there is a split among the circuit courts of appeal as to whether claims for injunctive relief for constitutional violations, as well as damage claims, are "nonjusticiable." The Second, Fifth, Seventh, Eighth Circuits have all held that claims by military personnel for injunctive relief are barred by the doctrine of nonjusticiability. *Jones v. New York State Div. of Military and Naval Affairs*, 166 F.3d 45, 52 (2nd Cir. 1999); *Meister v. Texas Adjutant Gen. Dep't.*, 233 F.3d 332 (5th Cir. 2000); *Crawford v. Texas Army Nat'l Guard*, 794 F.2d 1034, 1036 (5th Cir. 1986); *Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765 (7th Cir. 1993); *Watson v. Arkansas Nat'l Guard*, 886 F.2d 1004 (8th Cir. 1989). However, the First and Third Circuits have held that such actions are justiciable. *Wigginton v. Centracchio*, 205 F.3d 504 (1st Cir. 2000); *Jorden v. Nat'l Guard Bureau*, 799 F.2d 99 (3rd Cir. 1986). The Eleventh Circuit has added another conflict by holding that all claims by military personnel for injunctive relief for constitutional violations are barred except those attacking the facial validity of military regulations. *Speigner*, supra.

Thus, differing circuits have reached totally opposite interpretations of this Court's statements in *Chappell* and *Stanley*. As the Eleventh Circuit noted in *Speigner*, "Despite the Supreme Court's attempt in *Stanley* to harmonize the approaches of the courts of appeal, implementation of *Stanley* has been inconsistent in cases for injunctive relief." *Speigner*, 248 F.3d ar 1296. Thus, the Eleventh Circuit recognizes that the issue the Petitioner presents in this Petition is one that needs to be settled by this Court.

In its opinion, the Eleventh Circuit relied on those cases from the Second, Fifth, Seventh and Eighth Circuit. That court cites the Seventh Circuit's opinion in *Knutson*, supra, for the principle that actions by military personnel seeking injunctive or declaratory relief are "nonjusticiable." *Knutson* cannot be read so broadly. Indeed, it recognizes that all claims of military personnel are not barred in civilian courts:

> Although the treatment of justiciability by the parties in their briefs is sparse, WIANG argued that staffing and the nondiscriminatory administration of its regulations governing the retention of personnel are of sufficient importance to preclude our review at this stage. Traditionally, support for the view that claims concerning the composition of the military do not lie within the purview of the judiciary have been found in *Orloff v. Willoughby*, 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed.2d 482 (1953) and *Gilligan v. Morgan*, 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 497 (1973). In an oft quoted passage from *Orloff*, the Supreme Court noted:

> [J]udges are not given the task of running the Army. The responsibility for setting up channels through which [complaints of discrimination, favoritism, etc.] can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Orloff, 345 U.S. at 93-94, 73 S.Ct. at 540. But reading *Orloff* to support broad deference to the military ignores the narrow context in which this language is meant to apply. Deference to the military only affected the Supreme Court's judgment as to the merits of Orloff's constitutional claim, not the question of whether it should have reviewed the claim at all. *Id.*, 345 U.S. at 91, 73 S.Ct. at 539. *Gilligan*, which arose out of the tragic events at Kent State, contains similarly sweeping language. According to the *Gilligan* Court, the Constitution vests '[t]he complex, subtle and professional decisions as to the composition, training, equipping, and control of a military force' exclusively in the legislative and executive branches. *Gilligan*, 413 U.S. at 10, 93 S.Ct. at 2446 (It should be clear that we neither hold nor im-

> ply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel.

Knutson, 995 F.2d at 768.

The Court, in *Knutson*, ultimately determined Knutson's claims to be nonjusticiable because of the underlying nature of the claims. Knutson attacked the procedures by which he was terminated without any allegation, as we have in this case, of prohibited discrimination.

As stated above, the Eleventh Circuit relied on two Fifth Circuit cases. The first, *Crawford*, supra, predated *Stanley* and thus, has little precedential value. While the Fifth Circuit held the plaintiff's claims for injunctive relief to be barred, it did acknowledge that such claims should be "carefully regulated," not completely barred. *Crawford*, 794 F.2d at 1037.

The second case, *Meister*, supra, addressed the claims of a civilian employee of the guard. The Fifth Circuit specifically held that the "incident to service" test of *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed.2d 152 (1950) did not bar the plaintiff's claims as to failure to promote. The Fifth Circuit then sent the plaintiff's other claims back to the lower court for evaluation under *Mindes v. Seamon*, 453 F.2d 197 (5th Cir. 1971).

Reliance by the Eleventh Circuit on the Third Circuit's opinion in *Jones*, supra, is misplaced. The Third Circuit in that case found that Jones was attacking the sufficiency of the process by which he was terminated, and since he had failed to seek

available administrative remedies, his claims were nonjusticiable. The Third Circuit upheld the exhaustion of administrative remedies requirement because it was contained in the very regulation which the plaintiff sought to enforce.

The Eleventh Circuit did recognize that the First and Third Circuits, relying on *Stanley* and *Chappell*, had found that actions, such as the one at bar, which seek only injunctive and declaratory relief, are justiciable. In *Wigginton*, supra, the plaintiff, a major in the Rhode Island Army National Guard, was terminated at the recommendation of a selective retention board. He brought suit under 42 U.S.C. §1983 challenging his termination. While the First Circuit held that Wigginton's damage claims were not justiciable, it determined that the injunctive and declaratory claims were clearly justiciable. That court held:

> The second, and controlling, reason is that, taken together, *Chappell* and *Stanley*, the Supreme Court decisions *Wright v. Park*, built upon – make it clear that intramilitary suits alleging constitutional violations but not seeking damages are justiciable.

Wigginton, 205 F.3d at 512.

In an opinion following *Chappell*, but predating *Stanley*, the Third Circuit also followed the simple and plain language of the Supreme Court in *Chappell* to hold that the nonjusticiablity principle of *Chappell* did not extend to claims for injunctive relief:

> Although the District Court made no specific mention of Jorden's claims for injunctive relief, i.e., reinstatement, it apparently found those claims barred by *Chappell*. We disagree. *Chappell* itself suggests that it leaves open claims for injunctive relief against the military, and has been so interpreted by every court to consider the question. Moreover, we find that permitting injunctive relief while denying a damages remedy is supported by considerations of policy. Finally, the law of this circuit dictates that Jorden's claim for injunctive relief be permitted.

Jorden, 799 F.2d at 109.

As can be seen above from the cases cited above, the courts of appeal of this nation are sharply in conflict over this Court's decisions in *Chappell* and *Stanley*. At the present time, the residence of our military personnel determines whether those persons may seek redress to prevent or halt constitutional violations. This unequal treatment of these personnel, due to the conflicts between the circuits, presents a compelling reason for this Court to grant certiorari review of this issue.

III. THE ELEVENTH CIRCUIT'S LIMITING OF THIS COURT'S STATEMENTS IN *CHAPPELL* AND *STANLEY* CONFLICTS WITH THIS COURT'S CLEAR HOLDING.

The year after *Jorden*, supra, this Court decided *Stanley*. In the wake of *Chappell*, much discussion arose over this Court's statement in *Chappell*, 462 U.S. at 304, 103 S.Ct. at 2368, that

"this Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." As stated above, this Court clarified this statement in *Stanley* by stating that the Court referred to "redress designed to halt or prevent the constitutional violation rather than the award of money damages." 483 U.S. at 683, 107 S.Ct. at 3063.

The Petitioner in this case brought this action for declaratory and injunctive relief in an attempt to halt and prevent the SRB from making retention decisions that were racial and gender based in violation of the constitution and several civil rights statutes. The Eleventh Circuit, in its decision in this case, while recognizing that this Court stated that injunctive relief may be available to military personnel to halt or prevent constitutional violations, chose to limit that relief to attacks on the facial validity of military regulations. The Eleventh Circuit has interpreted this Court's statements in *Chappell* and *Stanley* to mean that all claims by military personnel for constitutional wrongs are barred by the doctrine of nonjusticiability even redress designed to halt or prevent constitutional violations except those claims which relate to constitutional violations that are contained in a written military regulation. Thus, the Eleventh Circuit has held that while a member of the armed services may bring an action seeking injunctive relief from a racially discriminating regulation, that same person is barred from bringing an action to enjoin a racially discriminatory practice simply because it has not been reduced to writing. Such a holding is nonsensical. Surely, it is not permissible for the military to engage in racial and gender discrimination as long as it is

not done openly.

As authority for the Eleventh Circuit's delineation of this narrow exception to the nonjusticability doctrine, it states that the cases cited by this Court in *Chappell* and *Stanley* refer to only "cases challenging military regulations on their faces, rather than their application to discrete personnel decisions." *Speigner*, 248 F.3d at 1297. However, the personnel decisions being made by the SRB regarding the retention of white male officers were not discrete decisions made on an individual basis but instead represented a systemic practice to retain all non-white officers while non-retaining all others who did not fit that racial profile. The Eleventh Circuit, quoting *Crawford*, 794 F.2d at 1036, noted that "[i]n cases where claims by enlisted personnel against the military have been heard, it was '[t]he nature of the lawsuits, rather than the relief sought, [that] rendered them justiciable.'" This is absolutely true but was totally ignored by the Eleventh Circuit. The nature of this action is intentional discrimination, the same cause of action this Court found actionable for injunctive relief in *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764 (1974). To make a distinction between *Frontiero* and this case, not on the nature of the lawsuit, but because the discrimination was encompassed in a regulation rather than inflicted by practice, is a dangerous precedent to establish.

Under this interpretation of *Chappell* and *Stanley*, the military could refuse to promote women because of their gender as long as the practice was not based on a written regulation and these military personnel would not have any available redress to halt or prevent this blatant violation of their consti-

tutional rights. Just as "our citizens in uniform" are not stripped of their constitutional rights because "they have doffed their civilian clothes, *Chappell*, 462 U.S. at 304, 103 S.Ct. at 2368, military officials cannot ignore the constitution once they have donned their uniforms. This Court has long held that a law or regulation may be "nondiscriminatory on its face but can be grossly discriminatory in operation." *M.L.B. v. S.L.J.*, 519 U.S. 102, 105, 117 S.Ct. 555, 558 (1996); *Crawford v. Board of Education of City of Los Angeles*, 458 U.S. 527, 102 S.Ct. 3211 (1982); *Personnel Administrator of Massachusetts*, 442 U.S. 256, 99 S.Ct. 2282 (1979). Likewise, just because the discrimination is not being done based on any kind of written regulation or policy does not mean that it is not wrong or unconstitutional or totally beyond the reach of the judiciary on the basis of nonjusticiability. It is unfathomable that the Eleventh Circuit's opinion would allow the military to engage in discriminatory practices without giving the affected military personnel any redress to stop the discrimination.

While "civilian courts have traditionally deferred to the superior experience of the military in matters of duty orders, promotions, demotions and retentions," *Knutson*, 995 F.2d at 771, that deference should not extend to acts of intentional discrimination by the military. While the Petitioner recognizes that there are circumstances, peculiar to the military environment, which create "special factors counseling hesitation," *Chappell*, 462 U.S. at 298, 103 S.Ct. at 2365, none of those "special factors" exist to "counsel hesitation" when the military is engaging in intentional racial and gender discrimination. Indeed, this Court has never, to the Petitioner's knowledge, ex-

tended the nonjusticiability doctrine to cases such as this. *Chappell* and *Stanley* both involved suits for damages and specifically dealt only with the question of whether the type of actions recognized in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) could be extended to the military arena. This Court said they could not, but clearly left the door to the courthouse open to all military personnel for certain type of actions, *i.e.*, actions designed to prevent or halt constitutional violations. Despite the Eleventh Circuit's attempt to limit this Court's statements in *Chappell* and *Stanley*, this Court clearly said that the nonjusticiablity doctrine does not apply to cases in which the plaintiff seeks to halt or prevent the kind of conduct complained of in this case. Given that the only relief the Petitioner seeks here is to halt or prevent racial and gender discrimination, the solution and remedy is clear. The Eleventh Circuit, like every other court in this land, is bound by the decisions of this Court. It is not for that court to say that this Court meant something other than what this Court clearly said.

The Eleventh Circuit in the final paragraph of its opinion states that "it is imperative to the military that only those officers determined to be competent to serve are retained" and "[t]o dictate to the military which officers should be considered competent" is an impermissible interference with the military. While the Petitioner agrees with this statement, the Petitioner strongly believes, based on this Court's statements in *Chappell* and *Stanley*, that when a plaintiff can demonstrate that retention decisions are being made not based on the competency of the officers but on the race or gender of the officers,

an action can be maintained to halt or prevent that discrimination whether that discrimination is based on a regulation or unwritten policy. Indeed, the holding of the Eleventh Circuit is tantamount to saying that race can be the basis in deciding whether a military officer should be retained as long as the practice is not embodied in a writing. Counsel for the Petitioner spent some time in the army and in those eleven years in which counsel was associated with the military, counsel did not see one thing that a white man could do better than a black man or one thing a black man could do better than a white man. There is nothing about the color of a man's skin that has anything to do with the quality of his soldiering. Contrary to the Eleventh Circuit's holding, there can be no possible legitimate military reason for making retention decisions on the basis of race.

What is of concern here is the simple proposition of whether military personnel are absolutely precluded from seeking declaratory and injunctive relief from intentional acts of discrimination unless those acts are based on a written regulation. The case reports are replete with case after case in which the courts of this land have interceded to correct or punish acts of discrimination prohibited by our Constitution or statutes. To the extent one is willing to acknowledge the concept of "Natural Law," such discrimination cries out for redress. It is contrary to every aspect of our modern conception of simple right and wrong. While the District Court in this case, to its credit, noted that such a result "seems antithetical to our system of justice", this statement fell short. Such a decision is antithetical to our system of justice and conflicts with this Court's clear holdings

in *Chappell* and *Stanley*. There is, and can be, no authority for anyone, even the commanding officer of a military unit, to engage in unconstitutional discrimination. The Eleventh Circuit's decision in this case is contradictory and contrary to this Court's holdings in *Chappell* and *Stanley* and should be reversed.

CONCLUSION

In light of the sharp conflicts between the courts of appeal on the issue raised in this petition and because the decision of the Eleventh Circuit in this case conflicts with this Court's previous holdings in *Chappell* and *Stanley*, the petition for a writ of certiorari should be granted.

Respectfully submitted,

J. DOYLE FULLER
Law Office of J. Doyle Fuller, L.L.C.
2851 Zelda Road
Montgomery, Alabama 36106
(334) 270-0020

Counsel for Petitioner

September 2001

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MARVIN K. SPEIGNER, JR., et al.,	)
	)
Plaintiff,	)
	)
v.	)
	)
WILLIE ALEXANDER, et al.,	)
	)
Defendants.	)

MEMORANDUM OPINION

I. INTRODUCTION AND PROCEDURAL HISTORY

The plaintiff, Marvin K. Speigner, initiated this class action in the Circuit Court of Montgomery County, Alabama, against the Alabama State Military Department, Major General Willie Alexander, the present Adjutant General of the State of Alabama, and Major General Clyde E. Hennies, the former Adjutant General of the State of Alabama. Although not specifically pled in the complaint, the parties agree that Alexander and Hennies were sued in their individual capacities and that Alexander is sued in his official capacity as well. The case was

removed to this court on August 8, 1999. The plaintiff's complaint contains a claim of racial discrimination under 42 U.S.C. § 1981 (Count I), a claim of denial of equal protection under 42 U.S.C. § 1983 (Count II), a claim of denial of due process under 42 U.S.C. § 1983 (Count III), and a claim of race-based conspiracy under 42 U.S.C. § 1985(3) (Claim IV).

On February 18, 2000, the Alabama State Military Department and Willie Alexander, in his official capacity, filed a motion for partial summary judgment arguing that the § 1981 claim merges into the § 1983 claim and also arguing that Claim IV, the conspiracy claim, was barred by the intracorporate conspiracy doctrine. The motion was set for submission on March 17, 2000. On February 24, 2000, a motion for summary judgment was filed on behalf of Alexander and Hennies in their individual capacities. The motion argued that Alexander and Hennies were entitled to qualified immunity and that they were entitled to intraservice immunity. It also argued the same ground contained in the motion filed by them in their official capacities. That motion was set for submission on March 27, 2000. On April 10, 2000, the Alabama State Military Department, Alexander in his official, and individual capacity and Hennies in his individual capacity filed another summary judgment motion which argued that (1) as to Counts I and II, there is no evidence of intentional racial discrimination; (2) as to Count III, there is no legal entitlement to relief and (3) as to Alexander, in his official capacity and the Alabama State Military Department, all of the claims are not justiciable. That motion was set for submission on May 9, 2000. On May 19, 2000, Speigner filed a response to the summary judgment

motion on the merits with one exception. He filed a Rule 56(f) motion with regard to qualified immunity.

On June 1, 2000, the court held a hearing on Speigner's motion for class certification. At the hearing, Speigner orally dismissed his damages claims which had the effect of dismissing Hennies and all claims against Alexander in his individual capacity.[1] Thus, the present case remains one for declaratory and injunctive relief against the Alabama Military Department and Alexander in his official capacity.

The defendants seek summary judgment on a variety of grounds. There is no need for a discussion of all of those grounds. The court concludes that the defendants are entitled to summary judgment because the claims which Speigner presents are non-justiciable.

II. FACTUAL BACKGROUND

The facts viewed in the light most favorable to Speigner establish the following:

In 1998, Speigner was a Lieutenant Colonel in the Alabama Army National Guard with twenty five (25) years of service. As an officer with at least years of service, his military record was subject to annual review by Selective Retention Boards (SRB). The purpose of the SRB was to evaluate officers and warrant officers to "ensure that only the most capable officers

[1] Separate orders have been entered dismissing Alexander in his individual capacity and Hennies.

[were] retained beyond 20 years of qualifying service for assignment to the comparatively fewer higher level command and staff positions." After consideration of an officer's record and other selection criteria, an SRB could recommend that an officer be retained for a certain time or not retained. Speigner was considered by the 1997 and 1998 SRBs. The 1997 SRB recommended that he be retained for one year, and the 1998 SRB recommended that he not be retained. As an officer not selected for retention, Speigner was separated from the Army National Guard o or about April 10, 1998. In his capacity as the Adjutant General, Hennies review and approved the results of the 1997 and 1998 SRBs.

From 1996 through 1999, the SRBs have not retained 41 white male officers of the Alabama Army National Guard while black male officers under consideration have enjoyed a one hundred percent retention rate. Only one female and one "other" race male were not retained during this time.

Regulations dictated that the SRB panels consist of three or nine members. On January 24, 1997, the Adjutant General of Alabama made a request for an exception to expand the composition of SRB panels to five members. Permission to expand the board was granted. Although applicable regulations precluded a member of an SRB from sitting on consecutive panels, per the request of Hennies, Alexander was given special dispensation to serve as a member of the 1997 and 1998 SRBs.[2] Speigner recalls that Hennies had previously commented about

---

[2] See Defendants' Exhibit 17.

the lack of black colonels on his staff and stated his desire to do something about racism in the National Guard.

III. SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." This standard can be met by the movant, in a case in which the ultimate burden of persuasion at trial rests on the nonmovant, either by submitting affirmative evidence negating an essential element of the nonmovant's claim, or by demonstrating that the nonmovant's evidence itself is insufficient to establish an essential element of his or her claim. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The burden then shifts to the nonmovant to make a showing sufficient to establish the existence of an essential element to his claims, and on which he bears the burden of proof at trial. Id. To satisfy this burden, the nonmovant cannot rest on the pleadings, but must, by affidavit or other means, set forth specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e).

The court's function in deciding a motion for summary judgment is to determine whether there exist genuine, material issues of fact to be tried; and if not, whether the movant is entitled to judgment as a matter of law. *See* Dominick v. Dixie Nat'l Life Ins. Co., 809 F.2d 1559 (11th Cir. 1987). It is substantive law that identifies those facts which are material on mo-

tions for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 258 (1986); *see also* De Long Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499 (11th Cir. 1989), cert. denied, 494 U.S. 1081 (1990).

When the court considers a motion for summary judgment, it must refrain from deciding any material factual issues. All the evidence and the inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmovant. Earley v. Champion Int'l Corp., 907 F.2d 1077, 1080 (11th Cir. 1990); *see also* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The movant bears "the exacting burden of demonstrating that there is no dispute as to any material fact in the case." Warrior Tombigbee Transp. Co. v. M/V Nan Fung, 695 F.2d 1294, 1296 (11th Cir. 1983); *see also* Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

IV. DISCUSSION

A. THE RULE 56(f) ISSUE

After Speigner responded to the defendants' motion for summary judgment on non-justiciability grounds, he filed a Rule 56(f) motion seeking discovery. The motion is not supported by an affidavit and contains only the allegation that "plaintiff cannot adequately answer the issue of summary judgment motions filed by the defendants without further discovery."

Under the law of this circuit, a "rule 56(f) motion must be supported by an affidavit which sets forth with particularity

the facts the moving party expects to discover and how those facts would create a genuine issue of material fact precluding summary judgment." Harbert International, Inc. v. James, 157 F.3d 1271, 1280 (11th Cir. 1998). "Whether to grant or deny a Rule 56(f) motion for discovery requires the court to balance the movant's demonstrated need for discovery against the burden such discovery will place on the opposing party." Id. Speigner seeks to depose the individual defendants but fails to indicate what information these defendants might have which would be helpful to him in opposing summary judgment on non-justiciability grounds. He has, thus, failed to make the threshold showing required by Rule 56(f). In all candor, however, it appears to the court that there is no need for discovery on the non-justiciability issue. There is no dispute about Speigner's allegations and the court, in ruling on the motion for summary judgment, views those allegations in a light most favorable to Speigner. In assessing the validity of the defendants' non-justiciability argument, the court will assume that Speigner is the victim of intentional racial discrimination and a race-based conspiracy and that he has been deprived of a property interest without due process of law. The facts about his separation are undisputed. He was a lieutenant colonel with 25 years of service in the National Guard who was separated from the service because an SRB recommended that he not be retained. Thus, the defendants' motion for summary judgment on non-justiciability presents a legal issue rather than a factual one. Speigner's Rule 56(f) motion has provided no grounds for discovery at this stage of the proceedings and is due to be denied.

B. NON-JUSTICIABILITY[3]

Speigner asks for declaratory and injunctive relief, including back pay, benefits, and reinstatement. The defendants argue that his claims are barred because they are non-justiciable. While military personnel are not absolutely precluded from seeking redress for constitutional rights violations in civilian courts for wrongs suffered incident to military service, the Supreme Court has stated that "[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers. Chappell v. Wallace, 462 U.S. 296 (1983). The reasoning behind this hands-off approach is two-fold: the unique disciplinary structure of the military and pervasive Congressional activity in the field, militate against permitting military personnel to sue their superior officers for constitutional violations that "arise out of or are in the course of activity incident to [military] service." United States v. Stanley, 483 U.S. 669, 684 (1987).

Both Stanley and Chappell involved Bivens[4] actions by military personnel against their superior officers. Nevertheless, most circuit courts reviewing this issue have agreed that

---

[3] The non-justiciability issue was raised on behalf of the Alabama State Military Department and Alexander in his official capacity in the motion for summary judgment filed on April 10, 2000. Speigner has filed a response to the motion.

[4] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1983).

there is "no principled basis for according state actors sued under 42 U.S.C. § 1983 a different degree of immunity than would be accorded federal actors sued for an identical abridgment of rights under Bivens." Wright v. Park, 5 F.3d 586, 591 (1st Cir. 1993) (citing Butz v. Economou, 438 U.S. 478, 500 (1978)). As a result, the principles articulated in Stanley and Chappell have been broadly construed to apply equally to claims for damages against state officials under § 1983. Brown v. United States, 739 F.2d 362, 267 (8th Cir. 1984), *cert. denied*, 473 U.S. 904 (1985); Marleton v. Temple, 747 F.2d 1348, 1350-51 (10th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985), Jorden v. National Guard Bureau, 799 F.2d 99, 104-06 (3rd Cir. 1986), *cert. denied*, 484 U.S. 815 (1987); Crawford v. Texas Army National Guard, 794 F.2d 1934 (5th Cir. 1986). That proscription against judicial review of damages claims applies with equal force to claims brought under 42 U.S.C. § 1981. *See* Gonzalez v. Dept. of Army, 718 F.2d 926 (9th Cir. 1983). That is true because the "incident to service test" elaborated upon in Stanley has been "broadly construed to immunize the United States and members of the military from any suit which may intrude in military affairs, second-guess[ ] military decisions, or impair[ ] military discipline." Presley v. Jackson Municipal Airport Authority, 94 F.Supp.2d 755, 759 (S.D. Miss. 2000).

Speigner, unlike the plaintiffs in Chappell and Stanley, now seeks only injunctive and declaratory relief and the Supreme Court has permitted some suits against the military for injunctive relief to go forward. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (first amendment challenge to Air Force dress code regulation); Rostker v. Goldberg, 453 U.S. 57 (1981) (equal

protection challenge to all-male draft registration); Brown v. Glines, 444 U.S. 348 (1980) (first amendment challenge to Air Force regulation regarding circulation of petitions); Parker v. Levy, 417 U.S. 733 (1974) (vagueness challenge to criminal provisions of military code); Frontiero v. Richardson, 411 U.S. 677 (1973) (equal protection challenge to statutes discriminating against women in military benefits) (citations omitted). However, as one court pointed out, these cases all involved "challenges to the facial validity of military regulations and were not tied to discrete personnel matters." Crawford, 794 F.2d at 1036. Therefore, where a claim for reinstatement or other injunctive relief "implicates only the nature of procedure used in [the] termination," and does not involve a facial constitutional challenge, it is generally found to be nonjusticiable. Knutson v. Wisconsin National Guard, 995 F.2d 765, 770 (7th Cir. 1993). Given that distinction, this court agrees that claims, such as here, for injunctive and declaratory relief which pertain only to personnel decisions, are discretely personal matters and fall outside of the type of claims for injunctive cited which the Supreme Court has permitted. A claim for injunctive relief seeking review of a personnel decision, especially where it is the decision to separate an individual from the military, implicates the same threat ot military autonomous decision-making as a constitutional claim for damages. *See* Watson v. Arkansas National Guard, 886 F.2d 765, 770 (7th Cir. 1993). Given that distinction, this court agrees that claims, such as here, for injunctive and declaratory relief which pertain only to personnel decisions, are descretely personal matters and fall outside of the type of claims for injunctive relief cited which

the Supreme Court has permitted. A claim for injunctive relief seeking review of a personnel decision, especially where it is the decision to separate an individual from the military, implicates the same threat to military autonomous decision-making as a constitutional claim for damages. *See* Watson v. Arkansas National Guard, 886 F.2d 1004 (8th Cir. 1989) (decidng that intra-military action for injunctive relief raises the same concerns as intra-military action for damages); Crawford, 794 F.2d at 1036 ("suits for injunctive relief, like those for monetary damages, must be carefully regulated in order to prevent intrusion of the courts into military structure."); Farmer v. Mabus., 940 F.2d 921, 924 (5th Cir. 1991) (same).

In order to avoid the result compelled by the Chappell/Stanley analysis, Speigner argues that the test enunciated by the United States Court of Appeals for the Fifth Circuit in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), rather than the Chappell/Stanley "incident to service test" should be applied and that an analysis of the so-called Mindes factors mandates the conclusion that his claims are justiciable. For the reasons which follow, the court concludes that the Mindes factors are no longer controlling.

The United States Supreme Court rendered its decision in Chappell v. Wallace on June 13, 1983. In its first opportunity to decide a non-justiciability issue involving the military following Chappell, the Eleventh Circuit concluded that the Mindes factors applied. Stinson v. Hornsby, 821 F.2d 1537, 1540 (11th Cir. 1987). The decision in Stinson, however, is not particularly persuasive precedent. Judge Hill dissented and Judge Henderson specially concurred. As Judge Henderson noted:

> I concur in the decision of the panel, however, in deference to the precedential weight of Mindes. I take this opportunity to call attention to the recent interpretation of Chappell by the Fifth Circuit Court of Appeals, finding claims such as these non-justiciable without resort to the cumbersome Mindes analysis, in the hope that this matter might be reexamined en banc and the utility of the Mindes test reconsidered in light of more recent Supreme Court decisions.

Id. at 1541. The decision to which Judge Henderson was referring is the decision of the Fifth Circuit in Crawford v. Texas Army National Guard, 794 F.2d 1034 (5th Cir. 1986). In that case, two members of the Texas National Guard sued the Guard, the governor of Texas and 12 military personnel alleging that they were the victims of racial discrimination and retaliation. The Fifth Circuit, interpreting Chappell, concluded that the lawsuit was due to be dismissed as non-justiciable.

In Judge Henderson's words:

> Conspicuously absent in Crawford is nay application of the Mindes test for adjudicating charges of civil rights violations. Clearly, the court must have found that the Supreme Court's opinion in this area are controlling. The instant facts present the same kind of a case found non-justiciable in Crawford and Chappell. Stinson's claims for reinstatement, back pay and injunctive relief under 42 U.S.C. Section 1981 and 1983 are

> challenges to military personnel decisions which would require a court to review his commanding officer's decisions concerning the promotion and dismissal of his men, determinations particularly dependent on the exercise of military discretion.

Stinson v. Hornsby, 821 F.2d at 1542.

On June 25, 1987, just prior to the issuance of the panel opinion in Stinson, the Supreme Court issued its opinion in United States v. Stanley. The decision in Stanley does much to explain Chappell.[5] As the decision in Stanley makes clear, the doctrine of non-justiciability of suits by military personnel precludes all claims for relief which "arise out of or are in the course of activity incident to service." United States v. Stanley, 483 U.S. at 684. The panel in Stinson does not discuss Stanley at all. Had Stanley been applied, it would have resulted in a different ruling because the Mindes factor test is insufficiently narrow under the Stanley opinion. The standard enunciated in Chappell and further explicated in Stanley supersedes the Mindes factor test.

This court's conclusion that the Mindes factors have been superseded is supported by the post-Stinson decision of the Eleventh Circuit in United States v. Kitowski, 931 F.2d 1526 (11th Cir.), *cert. denied*, 502 U.S. 938 (1991). In that case, the court

---

[5] The court in Stanley noted that it granted certiorari because ". . . the Courts of Appeals have not been uniform in their interpretation of the holding in Chappell. United States v. Stanley, 483 U.S. at 676.

did not apply or discuss the Mindes factors but rather applied a simple three factor test to determine whether an activity is "incident to service." The court, citing the Stanley decision, noted that the Supreme Court has interpreted the non-justiciablity doctrine "strictly." Id. at 1529. The court's conclusions that the Mindes factors no longer apply is also supported by two other decisions from this district. *See also* Neal v. Alabama National Guard, 1997 WL 114910 (M.D. Al. 1997) (In light of the Supreme Court's Stanley holding, this court finds that the "incident to service" standard is applicable rather than the Mindes factors.) *See also* Smith v. Smith, No. 96-W-1419-N (M.D. Ala., November 26, 1997), slip op. at 18.

Having concluded that the "incident to service test" applies, the court must now determine whether Speigner's injuries occurred incident to his military service. As noted above, the law of this circuit requires examination of three factors: (1) the duty status of the service member, (2) the place where the injury occurred, and (3) the activity of the serviceman at the time of injury. United States v. Kitowski, 931 F.2d at 1528. Of these factors, duty status is the most important. Parker v. United States, 611 F.2d 1007, 1013 (5th Cir. 1980). Given the nature of the alleged injury in this case, the place of injury has no place in the analysis. The application of factors one and three clearly establish that the constitutional injury which Speigner allegedly was "incident to service." He was a National Guard officer seeking retention from a Service Review Board whose decision would ultimately be reviewed by the Adjutant General. He was not retained, according to his allegation, because he was white. He was also denied due pro-

cess of law. It is hard to imagine a case with more connection to military decision-making authority. Because the injury which Speigner suffered was incident to his National Guard service, his claims are non-justiciable.

It seems antithetical to our system of justice to say that a court cannot redress intentional racial discrimination in our armed forces. Nonetheless, that is the law of the Supreme Court which this Court is bound to follow. Accordingly, the plaintiff's claims are due to be dismissed.

IV. CONCLUSION

For the foregoing reasons, the court concludes that the defendants are entitled to summary judgment on all of Speigner's claims because they are non-justiciable. A separate judgment will be entered accordingly.

DONE the 30th day of June, 2000.

/s/ _____
JOHN L. CARROLL
UNITED STATES
MAGISTRATE JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 00-13616

D.C. Docket No, 99-00846-CV-C-N

MARVIN K. SPEIGNER, JR.,
Retired,

Plaintiff-Appellant,

versus

WILLIE A. ALEXANDER, Major
General, Alabama Army National
Guard, The Adjutant General,
CLYDE A. HENNIES, Major
General, former Adjutant
General, Alabama Army National Guard, et al.,

Defendants-Appellees.

Appeal from the United States District Court
For the Middle District of Alabama

(April 24, 2001)

Before BIRCH and HULL, Circuit Judges and TIDWELL*, District Judge.

In this opinion, we decide whether a suit for injunctive relief based on a personnel decision can be brought against the Alabama National Guard ("Alabama Guard"). The district court dismissed the claim as nonjusticiable. We AFFIRM.

I. BACKGROUND

Plaintiff-Appellant Marvin K. Speigner, Jr. a white male, was removed from the Alabama Guard after 35 years of service. He had reached the rank of Lieutenant Colonel. Because he was an officer with at least 20 years of service, Speigner was subject to annual review by the Selective Retention Board ("SRB"). The SRB considers an officer's record in light of United States Nation Guard "National Guard") selection criteria, and either recommends that an officer be retained, be retained for a limited period, or ot be retained at all. In 1997, the SRB recommended that Speigner be retained for one year, and in 1998, it recommended that Speigner not be retained. Defendant

---

*Honorable G. Ernest Tidwell, U.S. District Judge for the Northern District of Georgia, sitting by designation.

BIRCH, Circuit Judge:

Clyde Hennies, then Adjutant General, approved both of these recommendations. Accordingly, Speigner was separated from the Alabama Guard in 1998.

Speigner identifies two regulations that were not followed during his SRB reviews. First, both the 1997 and 1998 SRBs had five members, rather than the mandated three or nine. Also, defendant Willie Alexander, a black colonel, sat on both boards, through regulations preclude a member of an SRB from sitting on consecutive panels that consider the same officers. Hennies, then Adjutant General of the Alabama Guard, had received special permission each year from the National Guard to make both of these changes. Speigner alleged that he heard Hennies lament the lack of black colonels on his staff and express a desire to address racism in the Alabama Guard. The 1996 – 1999 SRBs removed 41 white male officers, 1 female, 1 "other" male, and 0 black males from the Alabama Guard. These statistics, combined with Hennie's statements and Alexander's presence on consecutive SRBs form the basis for Speigner's claim of racial bias.

Speigner filed a complaint, alleging racial discrimination under 42 U.S.C. § 1981, a denial of equal protection under 42 U.S.C. § 1983, a denial of due process under 42 U.S.C. § 1983, and race-based conspiracy, in violation of 42 U.S.C. § 1985.[1] He requested an injunction against racial discrimination in the

---

[1] In a later filing, Speigner agreed that his claim of race-based conspiracy under § 1985 was barred by the intracorporate conspiracy doctrine. R1-33-15. See McAndrew v. Lockheed Martin Corp., 206 F.2d 1031 (11th Cir. 2000) (en banc).

Alabama State Military Department, reinstatement, back pay, compensatory and punitive damages, and attorneys' fees. Because Speigner voluntarily dismissed his claims for compensatory and punitive damages,[2] the district court considered only his claims for declaratory and injunctive relief against the Alabama Military Department and against Alexander in his official capacity. The district court granted summary judgment against Speigner on the grounds that his case was nonjusticiable under Feres v. United States, 340 U.S. 135, 71 S.Ct. 153 (1950), Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362 (1983), and United States v. Stanley, 483 U.S. 669, 107 S.Ct. 3054 (1987).

II. DISCUSSION

We review a grant of summary judgment de novo, viewing all the facts in the light most favorable to the non-moving party. Harbert Int'l, Inc. v. James, 157 F.3d 1271, 1277 (11th Cir. 1998). Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c).

A. Feres and Its Progeny

The district court correctly granted summary judgment in this case based on the Supreme Court precedent set forth in Feres, Chappell, and Stanley. In Feres, the Supreme Court held

---

[2] As discussed in section IIA of this opinion, Speigner's claims for monetary damages were clearly nonjusticiable under United States v. Stanley, 483 U.S. 669, 107 S.Ct. 3054 (1987)

that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146, 71 S.Ct. at 159. This remained a limited doctrine until 1983, when the Supreme Court expanded the holding to include all suits for damages. Chappell, 462 U.S. at 305, 103 S.Ct. at 2368 ("We hold that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations.").[3] The impetus behind this decision was an acknowledgment of the "special nature of military life [and] the need for unhesitating and decisive action by military officers and equally disciplined by enlisted personnel [that] would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command." Id., at 304, 103 S.Ct. at 2367.

Because the circuits were inconsistent in their application of Chappell, the Court granted certiorari in Stanley. Stanley, 483 U.S. at 676, 107 S.Ct. at 3059-60. In Stanley, the Court reiterated the importance of the Feres "incident to service" test, and extended the nonjusticiability doctrine to include Bivens actions.[4] Id. At 683-84, 107 S.Ct. at 3064. Later, cases in several

---

[3] The doctrine was further expanded to include suits for non-constitutional violations in United States v. Shearer, 473 U.S. 52, 59, 105 S.Ct. 3039, 3044 (1985).

[4] Under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999 (1971), an individual can seek monetary damages from a federal official for a violation of constitutional rights.

of the circuits extended the application of the Feres "incident to service" test to cases brought under § 1983, an interpretation that grants state actors the same degree of immunity from civil suits as federal actors would be afforded under Stanley. See, e.g., Watson v. Arkansas Nat'l Guard, 886 F.2d 1004, 1007 (8th Cir. 1989) ("This circuit, along with the majority of circuits that have considered the question, has extended the logic of Chappell to action brought against National Guard officers under § 1983 [because] [t]he concern for the disruption of military discipline upon which Feres, Chappell, and Stanley are based applies equally when a court is asked to entertain an intramilitary suit § 1983."); accord Bowen v. Oistead, 125 F.3d 800, 803 n.2 (9th Cir. 1997); Wright v. Park, 5 F.3d 586, 591 (1st Cir. 1993). As a result of this line of cases, there is no recognized cause of action for a member of the armed forces to request monetary damages from the military if the claim is based on an injury that is incident to service.[5]

---

[5] We no longer apply the test in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971) to determine justiciability in cases by members of the armed forces brought against the military if the claim is based on an injury incident to service. See Stanley, 483 U.S. 669, 107 S.Ct. 3054 (1987) (establishing a broader test for nonjusticiability); United States v. Kitowski, 931 F.2d 1526 (11th Cir. 1991) (applying the "incident to service" test without mention of Mindes); Doe v. Garrett, 903 F.2d 1455, 1463 n. 15 (11th Cir. 1990) ("[I]t appears well established that Mindes need not be applied before reaching the merits of a statutory claim against the military.") But see Stinson v. Hornsby, 821 F.2d 1537, 1540 (11th Cir. 1987) (remanding case against the military to district court to apply Mindes factors). In this case, we expressly do not address the applica-

At issue in this case is whether this doctrine of nonjusticiability extends to cases for injunctive relief. Based on the policy behind the Supreme Court decisions, and consistent with the majority of the circuits that have addressed this issue, we hold that, with certain exceptions, it does. The Supreme Court has made clear that,

> [c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment.

Chappell, 462 U.S. at 300, 103 S.Ct. at 2366. It is this basic premise that underlies the string of cases finding suits by enlisted personnel against the military for an injury incident to service nonjusticiable for injunctive relief as well as damages.

B. Circuit Court Approaches

Despite the Supreme Court's attempt in Stanley to harmonize the approaches of the courts of appeal, implementation

---

bility of Mindes to other situations. See e.g., Meister v. Texas Adjutant Gen. Dep't, 233 F.3d 332, 341 (5th Cir. 2000) ("It is true that Stanley blocks claims brought by servicemen incident to their military service, which therefore preempts Mindes with respect to such claims. But claims still fall within Mindes and Stanley does not encompass-those involving 'internal military decisions' that are 'not incident to [a serviceman's] military service.'").

of Stanley has been inconsistent in cases for injunctive relief. A discussion of the differences is helpful to explain our rationale for agreeing with the majority of circuits that have addressed this issue.

The Seventh Circuit, in Knutson v. Wisconsin Air Nat'l Guard, 995 F.2d 765 (7th Cir. 1993), found cases for reinstatement against the military nonjusticiable. According to the court, "[t]hese sorts of reinstatement claims, often pending for several years in civilian courts, may well leave WIANG in limbo awaiting the outcome of litigation and thus significantly hamper its ability to staff properly and to fulfill its mission." Id. At 771. The result of review of military personnel decisions by civilian courts would be to "undermine military discipline and decision-making or impair training programs and operational readiness." Id.

In Watson, the Eighth Circuit found a case nonjusticiable for similar reasons. As does Speigner, Watson brought a 42 U.S.C. § 1983 action seeking damages, back pay, correction of his record, and reinstatement of the National Guard.[6] Watson, 886 F.2d at 1007. The Eighth Circuit dismissed his case because "the policies upon which the Feres doctrine, and subsequent case law in that doctrine's development, are premised heavily in favor or precluding claims for equitable relief." Id. at 1008. The court explained its decision by stressing that "[t]he

---

[6] While Watson's case was pending, the Supreme Court decided Stanley, causing Watson to abandon his claim for monetary damages. See Watson, 886 F.2d at 1007.

judiciary does not acquire competence in this area merely because the remedy sought is an injunction rather than damages. . . . To disallow claims for damages while agreeing to review claims for injunctive relief arising from the same facts would be to exalt for over substance." Id. at 1009. The court wanted to avoid "a highly intrusive judicial inquiry into personnel decisions that bear upon the readiness of the military to perform its mission." Id. at 1008.

The Fifth Circuit approaches cases against the military in a similar manner. Though it was not necessary to apply the Feres line of cases to the facts, the Fifth Circuit outlined the rationale and policy behind the nonjusticiability doctrine in Meister v. Texas Adjutant Gen. Dep't, 233 F.3d 332 (5th Cir. 2000). The court emphasized that "courts should not interfere with military discipline and management. These are areas where we have little competence or authority to proceed." Id. at 338. In Meister the court cited Crawford v. Texas Army Nat'l Guard, 794 F.2d 1034, 1036 (5th Cir. 1986), a pre-Stanley decision that, consistent with Chappell, applied the same rationale as Meister.

In Crawford, plaintiffs requested, inter alia, injunctive relief in the form of reinstatement of their eligibility for all available retirement benefits and the removal of certain information from their personnel files. The Fifth Circuit held that their case was nonjusticiable because "[t]he injunctive-relief exception to Chappell advocated by appellants could swallow Chappell's rule of deference" to the military establishment. Id. at 1036. In conclusion, the Fifth Circuit stated its belief that "suits for injunctive relief, like those for monetary damages, must be carefully regulated in order to prevent intrusion of

the courts into the military structure." Id. at 1036-37. The Fifth Circuit noticed an exception to this rule for cases involving "challenges to the facial validity of military regulations" that are distinct from "discrete personnel matters." Id. at 1036.

The Second Circuit also follows the same approach to cases by enlisted personnel against the military when the injury is incident to service. The court opined that "allowing service members to sue their superiors would unacceptably compromise military discipline and readiness for combat." Jones v. New York State Div. of Military and Naval Affairs, 166 F.3d 45, 52 (2nd Cir. 1999).

Relying on the same quoted from Stanley that Speigner relies on in this case, the minority of circuits have held that injunctive relief is attainable against the military. To make the argument that he could sue the military for monetary damages, Stanley relied on the sentence in Chappell that states, '[t]his Court has never held, not do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military." Chappell, 462 U.S. at 304, 103 S.Ct. at 2368. In Stanley, the Supreme Court called this argument "irrelevant," and pointed out that, "[a]s the citations immediately following that statement suggest, it referred to redress designed to halt or prevent the constitutional violation rather than the award of money damages." Stanley, 483 U.S. ay 683, 107 S.Ct. at 2368. From this sentence, Speigner and the First Circuit see a window for claims for injunctive relief against the military. See Wigginton v. Centracchio, 205 F.3d 504, 512 (1st Cir. 2000) ("[T]aken together, Chappell and Stanley . . . make it clear that intramilitary suits

alleging constitutional violations but not seeking damages are justiciable."). Before the Supreme Court decided Stanley, the Third Circuit, in a case that has been relied upon post-Stanley, also held that injunctive relief claims for reinstatement were justiciable based on Chappell. See Jorden v. Nat'l Guard Bureau, 799 F.2d 99, 111 (3rd Cir. 1986) ("[I]f Jorden establishes a constitutional violation, the remedy will be a court-ordered reinstatement, rather than the kind of ongoing judicial oversight held inappropriate in Gilligan. . . . Jorden's claims for reinstatement are reviewable.").

We do not find this argument persuasive, however, because the "citations immediately following" the Chappell quote that the Court referred to in Stanley are all cases challenging military regulations on their faces, rather than their application to discrete personnel decisions. See e.g., Goldman v. Weinberger, 475 U.S. 503, 106 S.Ct. 1310 (1986) (First Amendment challenge to dress code in Air Force); Rostker v. Goldberg, 453 U.S. 57, 101 S.Ct. 2646 (1981) (Fifth Amendment challenge to all-male draft registration); Brown v. Glines, 444 U.S. 348, 100 S.Ct. 594 (1980) (First Amendment challenge to regulation of petitions); Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547 (1974) (Fifth Amendment challenge that criminal provisions in the military code were overbroad and vague); Fontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764 (1973) (Fifth Amendment challenge to military benefits statute that discriminated against women).

In contrast, however, "civilian courts have traditionally deferred to the superior experience of the military in matters of duty orders, promotions, demotions, and retentions." Knutson, 995 F.2d at 771. In cases where claims by enlisted

personnel against the military have been heard, it was "[t]he nature of the lawsuits, rather than the relief sought, [that] rendered them justiciable." Crawford, 794 F.2d at 1036. See also Watson, 886 F.2d at 1010 ("There is a vast difference between judicial review of the constitutionality of a regulation or statute of general applicability and judicial review of a discrete military personnel decision.") Therefore, we now hold that cases brought by enlisted personnel against the military for injuries incident to service are nonjusticiable, whether the claims request monetary damages or injunctive relief. Consistent with Supreme Court precedent, this holding in no way bars facial challenges to military regulations.

C. Incident to Service Test

Accordingly, if Speigner's injury was incident to service in the Alabama Guard, it is nonjusticiable. We apply a three-part test to determine whether an injury is incident to service. When undertaking such an analysis, we consider, "(1) the duty status of the service member, (2) the place where the injury occurred, and (3) the activity the serviceman was engaged in at the time of injury." Pierce v. United States, 813 F.2d 349, 352-53 (11th Cir. 1987) (per curiam); see also Whitley v. United States, 170 F.3d 1061, 1070 (11th Cir. 1999). The rational behind this test is to separate cases that may interfere with military discipline and command decisions from those that do not. See Whitley, 170 F.2d at 1069.

Speigner was on active duty with the Alabama Guard, and the injury took place at a formal review by the SRB and as a consequence of this review. The district court correctly held

that the decision whether or not to retain Speigner meets the Pierce test and, therefore, is nonjusticiable. Accord Mier v. Owens, 57 F.3d 747, 751 (9th Cir. 1995) ("Military promotion is one of the most obvious examples of a personnel decision that is integrally related to the military's structure."). Because there are a limited number of positions available at the higher levels of command, it is imperative to the military that only those officers determined to be competent to serve are retained. To dictate to the military which officers should be considered competent would be to interfere in just the way that Feres and its progeny preclude.

III. CONCLUSION

Because Speigner's complaint arises from an injury that was incident to his service as an officer in the Alabama Guard, we AFFIRM the judgment of the district court that his case in justiciable.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 00-13616-GG

MARVIN K. SPEIGNER, JR.,
retired,

Plaintiff-Appellant,

versus

WILLIE A. ALEXANDER, Major General, Alabama Army National Guard, The Adjutant General, CLYDE A. HENNIES, Major General, former Adjutant General, Alabama Army National Guard, et al.

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

---

ON PETITION (S) FOR REHEARING AND PETITION (S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ____ F.2d ____).

Before: BIRCH and HULL, Circuit Judges and TIDWELL*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT

/s/ _____

UNITED STATES CIRCUIT JUDGE

ORD-42

(6/95)

---

*Honorable G. Ernest Tidwell, U.S. District Judge for the Northern District of Georgia, sitting by designation.